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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1956.

**No. 184**

MAX HALPERIN,

*Petitioner,*

*against*

UNITED STATES OF AMERICA.

## BRIEF ON BEHALF OF THE PETITIONER HALPERIN.

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MAX HALPERIN,

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*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.*

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## BRIEF ON BEHALF OF THE PETITIONER HALPERIN.

### Opinions Below.

The prevailing and dissenting opinions of the Court of Appeals (Appendix V, pages 288a, 316a, 381a) are reported in 233 F. 2d 556; upon rehearing another dissenting opinion was filed by the judge who first dissented and reported at 233 Fed. 2nd 592. All opinions below are printed in Appendix V, pages 288a to 393a.[1]

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[1] References to Appendix V are to page of Volume V of the appendix to the briefs filed in the Court of Appeals. Numerical references (not otherwise identified) are the pages of the record prepared and printed by the Clerk of this Court.

## Jurisdiction.

The judgment of the Court of Appeals was entered April 10, 1956 (Appendix V, page 358a). Petitions for rehearing were denied June 1, 1956 (Appendix V, page 394a). Petition for a writ of certiorari was filed June 21, 1956 and granted October 15, 1956 (984). Jurisdiction is invoked under 28 U. S. C. 1254 (1).

## Questions Presented.

Upon Halperin's petition the Court granted certiorari limited to the following questions (985-988).

1. When a defendant testifies in his own defense at his trial, and his answers to questions show that, although averring his innocence, he was justified in invoking the Fifth Amendment with regard to like questions before a Grand Jury—as in this case all agree—is not that defendant denied due process when the Government on cross-examination brings out before the trial jury, the fact that he refused to answer the questions before the Grand Jury, upon such constitutional grounds?

2. When a defendant has been subpoenaed to testify before a Grand Jury in an investigation, of which he is a primary target, has claimed his Constitutional privilege, advised the Grand Jury that he was doing so as an innocent man ensnared in suspicious circumstances and because he could not cross-examine or be represented by counsel, may the trial court charge the jury that they may consider his refusal to testify before the Grand Jury on the score of his credibility, although his trial testimony was entirely consistent with his position before the Grand Jury?

3. Under the circumstances surrounding a defendant's appearance before a Grand Jury as set forth in the last preceding paragraph, does not the Court's instruction as aforesaid illegally impeach and impede the defendant's statutory right to be a witness on his own behalf?

4. Does the rationale of *Raffel* v. *United States*, 271 U. S. 494, apply to prior invocation of the Fifth Amendment before a Grand Jury as distinguished from such action at a prior trial?

5. Does not the doctrine and rationale of *Slochower* v. *Board of Higher Education*, decided by this Court April 9, 1956, compel the conclusion that a defendant under the circumstances aforesaid, is denied due process of law when he is examined by the Government and compelled to admit that he refused to answer questions before the Grand Jury, and the Trial Court advises the jury they may consider that refusal on the subject of his credibility?

6. Is not a defendant, particularly one who asserted that he was invoking the Fifth Amendment as an innocent man being plotted against and beset by suspicious circumstances entitled to have the jury charged, "An innocent man may honestly claim his answers may tend to incriminate him"?

7. Does it constitute due process to subpoena a person to testify before a Grand Jury in an investigation of which he is a primary target, and thereby permit an examination before trial of a *de facto* defendant?

8. Does not the opinion of the Court of Appeals that the statute of limitations against conspiracy was not tolled, in that certain overt acts of concealment when committed

were chargeable to the original conspiracy disregard and deny effect to this Court's views on proof of subsidiary concealment conspiracies, as set forth in *Krulewitch* v. *United States*, 336 U. S. 440, and *Lutwak* v. *United States*, 344 U. S. 604?

9. Does not the conclusion of the Court of Appeals herein that a single conspiracy rather than a multiplicity of conspiracies are disclosed by the record, run counter to this Court's decision in *Kotteakos* v. *United States*, 328 U. S. 750?

11. Does a lawyer who advises a witness to plead the Fifth Amendment where the witness is justified in doing so become guilty of corruptly endeavoring to influence the witness merely because the interposition of the Constitutional privilege might also serve to protect the person giving the advice?

## Constitutional Provisions and Statutes.

### Fifth Amendment.

"* * * nor shall be compelled in any criminal case to be a witness against himself * * *."

### Section 371, Title 18 U. S. C.

"371. *Conspiracy to commit offense or to defraud United States*

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

## Section 3282, Title 18 U. S. C.

(As applicable to offenses prior to 1954 amendment.)

"3282. *Offenses not capital.*

Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within three years next after such offense shall have been committed. June 25, 1948, c. 645, 62 Stat. 828."

## Section 1503, Title 18 U. S. C.

"1503. *Influencing or injuring officer,* juror or witness generally.—Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner, or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence,

obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both. (June 25, 1948, c. 645, Sec. 1, 62 Stat. 769.)"

**Section 3481, Title 18 U. S. C.**

"*Competency of accused.*—In trial of all persons charged with the commission of offenses against the United States and in all proceedings in courts martial and courts of inquiry in any State, District, Possession or Territory, the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him. (June 25, 1948, c. 645, Sec. 1, 62 Stat. 833.)"

## Statement of the Case.

The indictment in the Southern District of New York containing seven counts was filed on October 25, 1954, against Max Halperin, Henry W. Grunewald, Daniel A. Bolich[2] and others: in Count 1 all defendants are charged with conspiracy to defraud the United States in the exercise of its governmental functions of administering the internal revenue laws, and to conceal the acts of the conspirators, in violation of the general conspiracy statute, 18 U. S. C., Section 371; in Counts 5, 6 and 7 petitioner Halperin and others are charged with having corruptly endeavored to influence witnesses before the Grand Jury in the Eastern District of New York in violation of 18 U. S. C., Section 1503. The conspiracy is alleged to have been in operation from January 1, 1946 to the return date of the indictment; and the activities of Halperin, charged

[2] Grunewald and Bolich likewise were granted certiorari on specific questions (984, 985, 987, 988).

in Counts 5, 6 and 7, are alleged to have taken place in March, 1952. Counts 3 and 4 were dismissed and are not involved on this petition.[3]

Although the Court of Appeals unanimously affirmed the convictions of Grunewald and Bolich, Judge Frank led a dissenting opinion as to the petitioner Halperin, holding that his Constitutional rights were violated, by the government's cross-examination at the trial, disclosing the fact that he had claimed his Constitutional privilege before the Grand Jury. Judge Frank again dissented from the majority ruling denying a re-hearing to the aforesaid defendants, this time extending his dissent to the Statute of Limitations' point, and holding that the conviction of all of the defendants under Count 1 was barred by the Statute of Limitations.

The charges in the indictment arose out of the administrative disposition of two alleged tax evasion cases which were being investigated by the Internal Revenue Bureau. One was known as the *Pattullo Modes* case and the other as the *Gotham Beef* case. Both concerns were represented by the New York law firm of Schopick & Davis (300, 314-315). Halperin, a practicing attorney for forty-five years (602), now in his 72nd year (601), had shared office space with the firm at the time in question (603-605).

According to the testimony of Davis, who was the government's chief witness, he had suggested to Halperin that Halperin contact Grunewald in Washington to get help in

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[3] Count 2 of the indictment was against Bolich, Sternberg and Scherm as employees of the Bureau of Internal Revenue. Sternberg and Scherm were acquitted, Bolich was convicted. Davis, Schopick and Hoffman were named as defendants, but the case as to them was severed. Petitioner Halperin was sentenced to five years imprisonment and $5,000 fine on count 1, and two years imprisonment and $1,000 fine on each of counts 5, 6 and 7, prison sentences to run concurrently.

Grunewald was convicted of conspiracy under Count 1, but the Court acquitted him under Counts 5, 6 and 7 (569).

the *Pattullo Modes* case and that Halperin, after some negotiation, told him that Grunewald had agreed to accept $100,000 (325-328). Thereafter, on January 5, 1949, Bolich, then Assistant Commissioner of Internal Revenue, told the Agent in charge of the *Pattullo Modes* case to close out the *Pattullo Modes* case on a non-prosecution basis (464-465). This decision was announced to the taxpayers on January 10, 1949 (433, 466, 467).

The object of the Pattullo Modes transaction was expressed by its principal, Marks, named as co-conspirator, but not indicted, as follows:

> "He [Davis] says all he could promise us that there would be a memorandum put into our file that the case was to be settled on a civil basis" (32).

In the *Gotham Beef* case, according to the government's proof, $60,000 was put in escrow by the principals therein (166, 167, 323) and on October 28, 1948, they were told that the case was closed without criminal prosecution (282).

The object of this transaction was expressed by the Gotham Beef principal Tobias, also named as a co-conspirator, but not indicted, as follows:

> "Now, the exact terms of the escrow * * * was * * * that until I were to have heard with my own ears from the Special Agent's office from a responsible official that there was to be no criminal prosecution in the Gotham matter * * * the money was not to be released" (165, 166).

Halperin, a lawyer, now over 71 years of age, was the only one of the three convicted defendants who testified in his own behalf. His testimony on direct showed his professional association with several alleged co-conspirators, and

his acquaintanceship with others, and professional employment in connection with the tax matters (605-670). Halperin strongly protested his innocence. His narration of the extent of his participation in the tax matters being entirely exoneratory in tenor (Pattullo Modes, 606-609, 614-616, 620-622, 626-631); (Gotham Beef, 651-655, 659).[4]

Thereupon, the Government was permitted to elicit from Halperin, and bring to the conspicuous notice of the jury upon cross-examination, over objection and exception (684, 693), that Halperin had invoked the Fifth Amendment before a Grand Jury in response to questions relating to the aforesaid associations and dealings (683-696) despite the fact that both the majority opinion and the dissenting opinion in the Court of Appeals acknowledge that Halperin was justified in claiming his Constitutional privilege upon the record (Vol. V—Appendix pages 311a, 317a).[5]

On re-direct, it was shown by reference to the Grand Jury minutes, that Halperin informed the Grand Jury that he was an innocent man and that he was invoking the Fifth Amendment (705), because he had no right to cross-examine witnesses against him in Grand Jury proceedings (708). Halperin also advised the Grand Jury that he was acting on advice of counsel (705, 707). Halperin, it must be noted further was a target of the Grand Jury investigation (696-698).

Thus, it was affirmatively, and indeed, conclusively shown that no inconsistency existed between Halperin's course of conduct before the Grand Jury and at the trial. Nevertheless, in this case, in which all that could stand

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[4] Judge Frank, commenting upon the evidence, wrote (Vol. V appendix page 329a):

"The evidence against Halperin is not overwhelming. The jury could have reasonably acquitted him."

[5] Judge Frank wrote "No one doubts he then properly asserted the privilege" (Vol. V appendix, 317a).

between Halperin and conviction was his credibility, the Trial Court authorized the jury to reject his testimony on the ground that he had asserted his Constitutional privilege before the Grand Jury (748, Exception 756).

Moreover, the Trial Court denied the request to charge "An innocent man may honestly claim that his answers may tend to incriminate him" (774, 712, 713).

The only overt acts shown to have been committed within three years of the filing of the indictment, related only to acts of concealment. Hence, prosecution was barred under 18 U. S. C., Section 328—all agree—Prevailing Opinion (Vol. V—Appendix p. 310a), Dissenting Opinion, (Vol. V—Appendix pp. 385a, 386a), unless there existed an endlessly surviving conspiracy to conceal as part of the original conspiracy.

After the credibility of the co-conspirator Davis (as to whom trial had been severed) who was the Government's principal witness, had been subjected to devastating attack, the Government on re-direct attempted to rehabilitate him by eliciting from him over objection and exception (388-399) that on or about the time of a Grand Jury investigation into the subject matter of this prosecution, and pursuant to a proposal by the witness that he would cooperate with the Government in its case against the appellants herein (389, 391, 392), Davis had made, through an attorney, a hypothetical statement consistent with his trial testimony. This testimony was admitted despite the fact that Davis' motive to fabricate at that time coincided with his motive to fabricate at the trial.

In February 1952 a grand jury was empaneled in the Eastern District of New York, to investigate fraud in the administration of the Internal Revenue Laws and their enforcement. It was this Grand Jury which subpoenaed Halperin and before which he appeared and refused to answer the questions on the ground of self-incrimination.

The evidence in support of the charge in Counts 6 and 7 tht Halperin attempted to corruptly influence Berman and Tobias, Gotham Beef principals, as prospective witnesses, shows however that Halperin merely advised them to plead the Fifth Amendment after learning from Berman for the first time that $60,000 had been put up by them in escrow in connection with their tax case (666).

Under Count 5, there was no evidence that Halperin himself had spoken to the Pattullo Modes principals concerning his role as a grand jury witness. The evidence did not support conviction in consequence of Davis' conversation with Marks since all that had been discussed by Halperin with Davis was speculation as to whether his clients would claim their Constitutional privilege before the grand jury (361, 362).

## Summary of Argument.

I: Halperin was denied due process of law, in derogation of the Fifth Amendment, when despite the undisputed facts (a) that Halperin was justified in claiming his constitutional privilege before the grand jury, and (b) that his trial testimony was entirely consistent with his course of conduct before the grand jury, whom he had advised that he was claiming his privilege as an innocent man, the government was nevertheless permitted to elicit from Halperin as a calculated feature of cross examination, that he had invoked the Fifth Amendment before the grand jury, and the Trial Court authorized the jury to discredit Halperin's trial testimony by reason of the aforesaid claim of constitutional privilege.

The aforesaid cross examination of Halperin, and the aforesaid charge to the jury constituted penalization of Halperin for having exercised his constitutional privilege, and under the doctrine and rationale of this Court's recent

decision in *Slochower* v. *Board of Higher Education*, 350 U. S. 551, constituted a denial of due process. Particularly, does this result follow when cognizance is taken of the widespread mistaken conviction that those who claim their constitutional privilege under the Fifth Amendment are either committing perjury or covering up their guilt, as this Court observed in *Ullman* v. *United States*, 350 U. S. 422.

In *Johnson* v. *United States*, 318 U. S. 189, this Court adopting the language of a Pennsylvania Supreme Court opinion noted that "The claim of privilege and its allowance is properly no part of the evidence submitted to the jury, and no inference whatever can be legitimately drawn by them from the legal assertion by the witness of his constitutional right."

The case of *Raffel* v. *United States*, 271 U. S. 494, does not apply to the facts herein, and in any event has been implicitly overruled by this Court, in the *Johnson* and *Slochower* cases. In *Raffel* this Court held it was not error to require Raffel when testifying at his second trial, to disclose that he had not testified at his first trial. In that case, comparison was being made of Raffel's actions upon two occasions, each of which was a trial in both of which he was a defendant. In our case the comparison is between a grand jury investigation and a trial which are distinctly unlike juridical quantities and hence furnish no basis for correlating refusal to testify at a grand jury investigation in terms of consistency, with testimony at a trial. The difference is noted at length in the dissenting opinion of Judge Frank herein (Appendix Volume V, 324a, 325a).

Moreover, in *Raffel*, this Court merely adjudicated the question certified to it, namely, whether it was error to compel Raffel to disclose that he had failed to testify at the first trial. The opinion of this Court plainly indicated that only if interrogation regarding the defendant's failure to testify at the first trial produced discrediting evidence

might the jury be entitled to deem his credibility impaired (p. 498 of 271 U. S.). In our case, no inconsistency between Halperin's position at the grand jury and at the trial developed. On the contrary, the trial testimony undisputedly shows that Halperin's claim of constitutional privilege at the grand jury was accompanied by a statement pointing to the very differences between a grand jury examination and a trial as the grounds for his refusal to testify at the grand jury and implicitly promising that he would testify at the trial, which he did.

Moreover, as Judge Frank's opinion further states, the *Raffel* doctrine applied to the instant case should be regarded as erroneous. Indeed, it had already been overruled at least inferentially by this Court (Volume V, Appendix, 320a, 321a, 323a). The error in the *Raffel* doctrine when applied to the facts herein is that it is practically impossible to limit the jury's use of the evidence regarding Halperin's claim of his constitutional privilege to credibility as distinguished from proof of guilt, and since this Court is formally on record in holding that the claim of constitutional privilege does not constitute proof of guilt, the evidence must be excluded altogether. (To the same effect see also 21 Illinois Law Review, 396-340, quoted at length in Judge Frank's opinion, Volume V, Appendix, 319a, 320a; McCormick on Evidence, p. 77 (1954).)

Judge Frank notes further that the *Raffel* case has been overruled in *Johnson* v. *United States*, 318 U. S. 189, *supra* (Volume V, Appendix, 323a, 327a, 329a), and that the primacy of the constitutional privilege is further strengthened by recent decisions of this Court, culminating in *Slochower* v. *Board of Higher Education*, 350 U. S. 551.

The Trial Court compounded the prejudicial effect of the instruction authorizing petitioner's conviction via destruction of his credibility because of his invocation of

the Fifth Amendment by refusing to charge as requested that "an innocent man may honestly claim that his answers may intend to incriminate him."

Still another aspect of the multiple error implicit in the Court's rulings arises from the fact that a defendant has a statutory right to testify and that the aforesaid rulings herein impaired that statutory right and is prejudicial to a defendant's right to elect whether he should take the stand (compare *Johnson* v. *United States*, 318 U. S. 189, *supra*).

II. Upon the record, Halperin was a primary target of the grand jury's investigation and a de facto defendant when he was subpoened before the grand jury where he claimed his constitutional privilege. Calling a person thus situated to testify before a grand jury is in itself a violation of his constitutional rights (*People* v. *De Feo*, 308 N. Y. 595, 602, 603 (1955), citing *Counselmann* v. *Hitchcock*, 142 U. S. 547; *United States* v. *Lawn*, 115 F. Supp. 674; *United States* v. *Blanton*, 77 F. Supp. 812).

Thus if the fact that Halperin claimed his constitutional privilege constitutes evidence against him, it is evidence illegally obtained and should not have been elicited (*Weeks* v. *United States*, 232 U. S. 383).

III. The Court of Appeals opinion indicates that the Court confirmed the conviction of Halperin on the corrupt influencing of witnesses counts solely on evidence that he advised prospective witnesses, who had ample justification to do so, to plead the Fifth Amendment. This was error (*United States* v. *Herron*, 28 F. 2d 122, 123; *United States* v. *Courtney*, 2d Cir. 236 F. 2d 921).

Moreover, the corrupt influencing of witnesses statute must be deemed unconstitutionally vague if it is to be applied to advice given to plead the Fifth Amendment.

IV. The Court of Appeals erred in holding that the Statute of Limitations did not bar prosecution of Halperin on the conspiracy charge. The principle argument and summary on the subject of the Statute of Limitations appears in Grunewald's brief upon which Halperin relies. Halperin also relies upon the argument and summary in Bolich's brief on the subject of multiplicity of conspiracies, particularly as it bears upon the Statute of Limitations question.

## ARGUMENT

### I.

**Halperin was denied due process of law in derogation of the Fifth Amendment at the trial when despite the undisputed facts**

**(a) that Halperin was justified in claiming his constitutional privilege before the grand jury.**

**(b) that his trial testimony was entirely consistent with his course of conduct before the grand jury, whom he had advised that he was claiming his privilege as an innocent man.**

1. **The government was permitted to elicit from Halperin, as a calculated feature of cross-examination that he had invoked the Fifth Amendment before the grand jury.**
2. **The trial court authorized the jury to discredit Halperin's vital trial testimony by reason of the aforesaid claim of constitutional privilege.**
3. **The trial court refused to charge that "An innocent man may honestly claim that his answers may tend to incriminate him".**

#### A. (Questions Presented 1, 2, and 5).

There can be no doubt that Halperin's defense was impeached beyond redemption the moment the govern-

ment launched upon the project of impressing upon the attention of the trial jury, the fact that Halperin had taken advantage of his constitutional right not to give evidence against himself before the grand jury. By such expose, belabored at some length (684-708), Halperin was subjected to arbitrary penalty for having taken advantage of his constitutional right, in view of the popular misconception that the constitutional privilege against the giving of testimony against oneself was intended only for the protection of the guilty.

As stated by Professor Ralph S. Brown Jr., professor of law at Yale Law School, in 40 American Bar Association Journal 404, 406, May, 1954.

> "What does the public know about the Fifth Amendment anyway? It is told in every headline on the authority of prominent legislators, that silence means guilt."

This court in *Ullman* v. *United States*, 350 U. S. 422, (March, 1956) took cognizance of the permeating extent of the prejudice against those who invoke the Fifth Amendment which necessarily abides in the mistaken conviction that those who claim the privilege are either covering up their guilt or are committing perjury. This court wrote at p. 426 of 350 U. S.,

> "Too many, even those who should be better advised, view this privilege as a shelter for wrongdoers. They too readily assume that those who invoke it are either guilty of crime or commit perjury in claiming the privilege."

Enlarging its comment, this court, in *Slochower* v. *Board of Higher Education*, 350 U. S. 551, 557 (April 9, 1956) wrote further:

"In Ullman *v.* United States, 350 U. S. 422, decided last month, we scored the assumption that those who claim this privilege are either criminals or perjurers. The privilege against self-incrimination would be reduced to a hollow mockery if its exercise could be taken as equivalent either to a confession of guilt or a conclusive presumption of perjury. As we pointed out in Ullman, a witness may have a reasonable fear of prosecution and yet be innocent of any wrongdoing. The privilege serves to protect the innocent who otherwise might be ensnared by ambiguous circumstances. See, Griswold, The Fifth Amendment Today (1955)."

The jury's latent prejudice against Halperin, thus generated by the government's persistent canvass of the subject of Halperin's claim of constitutional privilege before the grand jury was necessarily intensified, activated and channelized by the trial court's charge authorizing the jury to disbelieve Halperin's testimony and, in effect, convict him in consequence of his having invoked the Fifth Amendment before the grand jury.

The trial court charged (748):

"No witness is required to take the stand or or required to give testimony that might tend to incriminate him; but when a defendant takes the stand in his own defense at a trial, *it is proper to interrogate him as to previous statements which he may have made under oath concerning the same matter, including his assertion of his constitutional privilege to refuse to testify as to those matters before a grand jury. You may use this evidence of a defendant's prior assertions of the Fifth Amendment for the sole purpose of ascertaining the weight you choose to give to his present testimony with respect to the same matters upon which he previously invoked his privilege.*

> The defendant had the right of asserting the Fifth Amendment when he appeared before the grand jury, and I charge you that you are not to draw any inference whatever as to the guilt or innocence of the defendant in this case by reason of the fact that he chose to assert his unquestioned right to invoke the Fifth Amendment on that previous occasion.
>
> *However, it was proper for the Government to question the defendant with respect to his previous invocation of the Fifth Amendment, but you may consider this evidence of his prior assertions of the Fifth Amendment only for the purpose of ascertaining the weight you choose to give to his present testimony with respect to the same matters upon which he previously asserted his constitutional privilege.* It is not considered in a determination of the guilt or innocence of any co-defendant." (Italics ours.)

For appellant's exception to this charge see footnote (6) this page.

It is respectfully submitted that given the acknowledged circumstances (a) that Halperin was justified in claiming his constitutional privilege before the grand jury, as the prevailing and the minority opinions in the Court of Appeals, (Vol. V—Appendix 311a, 317a)[7] and the trial

[6] "I respectfully except to your Honor's reference to the testimony of Halperin and the cross examination of Halperin in connection with his grand jury testimony, and I respectfully except particularly to your Honor's language where your Honor said it was proper for the Government to interrogate Halperin in connection with his claim of constitutional privilege. And I respectfully except to your Honor's failure to tell the jury that innocent men have a right to use and claim the privilege. And I respectfully except to your Honor's statement to the jury that they may use the evidence of Halperin's claim of constitutional privilege as a basis by which they could judge the weight of his testimony at this trial." (756)

[7] Judge Frank wrote, "No one doubts he then properly assented the privilege" (Vol. V—Appendix, 317a).

court (748) agree; (b) that his trial testimony was entirely consistent with his refusal to testify before the grand jury, whom he had informed that he was innocent but that he would not give evidence against himself by advice of counsel, and because he could not cross-examine the witnesses against him before that tribunal (704-706)—that given all these separate and cumulative factors—the charge of the court authorizing the jury to disbelieve Halperin when his credibility was all that stood between him and conviction was a denial of due process under the doctrine and rationale of *Slochower* v. *Board of Higher Education*, 350 U. S. 551 *supra*.

In the *Slochower* case, this court held that due process was denied a municipal employee whose discharge was based upon his exercise of his constitutional right under the Fifth Amendment, where,

> "No consideration is given to such factors as * * * justification for exercise of the privilege. * * * or legal advice conscientiously given, whether wisely or unwisely". (P. 558 of 350 U. S.)

The trial court herein gave no consideration to justification, absence of inconsistency, or advice of counsel.

The jury was given the untrammelled right to discredit Halperin's testimony and protestations of innocence in consequence of the bare circumstance that he claimed his constitutional privilege without regard to his "justification for exercise of the privilege" and "legal advice conscientiously given", and in spite of the fact that both justification and legal advice with regard to the claim of privilege were clearly shown, and indeed not controverted. If Halperin was justified in refusing to testify before the Grand Jury, as both the majority and dissenting opinions and the trial court acknowledged, there can be no inconsistency

affecting credibilty, particularly in view of the difference in nature of the forums of the Grand Jury and the trial court, and Halperin's statement to the Grand Jury, basing his motivation for claim of privilege upon such difference.

Halperin's credibility, in all realism, was all that stood between him and conviction. To tell the jury that they might disbelieve Halperin in consequence solely of his utilization of his constitutional right is itself denial of due process, we respectfully submit, within the purport and tenor of the *Slochower* decision; even more immediate and direct than the denial of due process in the *Slochower* case inherent in Slochower's discharge. There only a governmental position was taken from the defendant, by a local body. Here, his very liberty is taken from him by an arm of the federal government itself.

That the assertion of constitutional privilege is not itself a ground for impeaching a witness' credibility was clearly enunciated by this Court in *Johnson* v. *United States,* 318 U. S. 189. In that case, Johnson testifying in his own behalf at his trial for income tax evasion for the years 1936 and 1937, asserted his constitutional privilege when interrogated by the government respecting income from illegal sources in 1938. The trial Court sustained Johnson's refusal to answer, but in his charge to the jury stated that Johnson's refusal to answer "may only be considered by you in testing his credibility . . ." (p. 195 of 318 U. S.).

This Court wrote (p. 196, 197 of 318 U. S.):

> "But where the claim of privilege is asserted and unqualifiedly granted, the requirements of fair trial may preclude any comment. That certainly is true where the claim of privilege could not properly be denied. The rule which obtains when the accused fails to take the stand (Wilson *v.* United States, 149

U. S. 60, 37 L ed. 650, 13 S. Ct. 765) is then applicable. As stated by the Supreme Court of Pennsylvania, "If the privilege claimed by the witness be allowed, the matter is at an end. *The claim of privilege and its allowance is properly no part of the evidence submitted to the jury, and no inferences whatever can be legitimately drawn by them from the legal assertion by the witness of his constitutional right.* The allowance of the privilege would be a mockery of justice, if either party is to be affected injuriously by it." Phelin *v.* Kenderdine, 20 Pa. 354, 363; Wireman *v.* Com., 203 Ky 62, 63, 261 SW 862. And see State *v.* Vroman, 45 SD 465, 473, 188 NW 746; Carne *v.* Litchfield, 2 Mich. 340; People *v.* McGungill, 41 Cal. 429. We also think that the same result should obtain in any case where the court grants the claim of privilege and then submits the matter to the jury, if that action may be said to affect materially the accused's choice of claiming or waiving the privilege and results in prejudice. The fact that the privilege is mistakenly granted is immaterial." (Italics supplied.)

In our case it is undisputed, as we have noted, that Halperin's claim of privilege was properly invoked by him; and properly allowed by the grand jury. Thus, the rule of the Johnson case is all the more readily available for application herein—uncomplicated by the problem posed by a mistaken claim and grant of privilege, notwithstanding which this court nevertheless upheld the primacy of the unchallenged assertion of the privilege.

In the language of the Pennsylvania court, adopted by this court in the *Johnson* case, Halperin's "claim of privilege and its allowance is properly no part of the evidence submitted to the jury and no inferences whatever can be legitimately drawn by them from the legal assertion by the witness of his constitutional right."

The Slochower and the Johnson rationale was anticipated in *Masterson* v. *Transit Co.*, 204 Mo. 507, 524, 525, in which the court wrote:

> "The right of the motorman to refuse to testify under the circumstances stated was a personal right of such high importance that it is expressly guarded in the Constitution itself. It is there given absolutely and unequivocally, yet we are now asked to declare that it is a right which the citizen will exercise at his peril, the peril of being branded with suspicion, the peril of having it brought up against him to impeach himself if he should ever assert his innocence. Such a ruling would be a gross impairment of the constitutional right;"

It is respectfully submitted that the *Masterson* case view coincides with the recent decisions of this Court culminating in the *Slochower* decision.

There is no more firmly established rule in the field of evidence than that which requires that only when inconsistency has been shown may former conduct be weighed against the witness' credibility (3 Wigmore on Evidence, Page 725, Section 1040).

It is interesting to note that in *Commonwealth* v. *Smith*, 163 Mass. 411, 432, the Court in approving the right to cross-examine a witness regarding a prior claim of refusal to answer on the ground of self-incrimination, found it necessary first to search for and purport to find the element of inconsistency. The Court wrote:

> "The defendant in such case now says he is innocent. He formerly did not say he was innocent, but that he would not answer lest he might incriminate himself."

In our case, even this misconceived inconsistency did not exist. Halperin did not give his explanation for not

testifying before the Grand Jury for the first time at the trial, but had given the same explanation to the Grand Jury itself. Halperin *did* formerly say he was innocent and his testimony shows moreover that his innocence was of a nature, as noted in the *Slochower* case, beset by circumstances of guilt which justified this action.

The Massachusetts Court erred in failing to recognize that innocence and self-incrimination are not mutually exclusive but may readily co-exist, but within the framework of the Court's mistaken view, the fact remains the Court appreciated that it must be able to pinpoint an inconsistency before it could hold the witness' credibility may be deemed impeached by the jury.

How far the trial court went to accomplish the destruction of Halperin's credibility in consequence of his claim of privilege, and thereby to effectuate his conviction appears from the following:

While Halperin was being cross-examined, the Court interpreted the Constitutional privilege in such fashion as to literally destroy the defendant Halperin's credibility. The court said (685-6) "I know the Government's position. As I see it, Mr. Corbin, no witness can be compelled to testify against himself. The witness is called before the grand jury and the answer was, I refuse to answer something on the ground that if I answer that question it will incriminate me. Mr. Corbin: Tend to incriminate. The Court: Or tend to incriminate.***."

The Court went further and said (691). "The Court: Would an answer to that question have incriminated you or tend to incriminate you?" Upon objection, it was withdrawn. Again, while Mr. Halperin was still being examined with respect to his claim of privilege before the Grand Jury, the Court asked (693) "And you say the answers given were true?", to which again objection was

taken, and the Court went on to say "The witness says he testified before the Grand Jury. I want to find out, when he says the question is there and the answer is there, whether he is also conceding that he was sworn to tell the truth and it was a truthful answer; not that it is merely in the minutes, but that that is the sworn testimony."

Counsel objected that it was an implication by the Court that the witness was lying. The Court again replied that he was not implying "that it was untrue"; that all he wanted to find out was that the defendant was not merely admitting that it was in the minutes, but that it was sworn testimony (693-694).

During the exchange motion for a mistrial and the withdrawal of a juror was made, it was denied and an exception taken (704).

It is, thus, obvious that with the leverage of Halperin's claim of privilege, the Court destroyed his credibility before the jury and the charge was even less than lip service to the rule.

## B. (Question Presented 4).

Under this subdivision we discuss, not only the question whether the rationale of *Raffel* v. *United States*, 271 U. S. 494, applies to a prior invocation of the Fifth Amendment before a Grand Jury as distinguished from failure to testify at a prior trial (Question Presented 4), but the related questions of the correctness of the ruling in the *Raffel* case and its present status in view of the recent trend of decisions by this court.

### (1).

In the *Raffel* case, on a first trial, the defendant therein did not testify in his own defense, although a government agent testified to an admission by the accused. On a second

trial the government agent gave similar testimony. This time the defendant took the stand and denied making the admission, and thereupon was compelled to acknowledge that he had not testified at the first trial. This court held it was not error to require Raffel to disclose that he had not testified at the first trial.

Since both occasions upon which comparison of Raffel's action was being made were trials, and hence, like quantities for the purposes of appraising his election to testify or not to testify, it was possible to urge that testifying at one trial was inconsistent with failure to testify at the other. However, a Grand Jury investigation and a trial are distinctly unlike quantities,—totally different categories —and hence furnish no basis for correlating refusal to answer questions at a Grand Jury investigation in terms of consistency with testimony at a trial, as far as the invocation of the privilege is concerned.

This is commented upon, at length, in Judge Frank's dissenting opinion, in support of his holding that

> "Raffel does not apply to the facts here" (Vol. V, Appendix 317a).

Judge Frank wrote (324a, 325a):

> "However, the rationale of the Johnson decision [Johnson v. United States, 318 U. S. 189, *supra*] becomes stronger, not weaker, in such circumstances. For a man in a grand jury hearing may have far better reasons for preserving silence: There he is not confronted with the adverse witnesses, has no opportunity to cross-examine them, cannot object to the reception of evidence which would be incompetent at a trial, is unable to call witnesses on his behalf, has no counsel to advise him, must submit to a secret and *ex parte* examination 'without the presence and control of a judge or any other impartial

official to * * * intervene, * * * to protect' him. As Judge Learned Hand said in 1953, 'Save for torture, it would be hard to find a more effective tool of tyranny than (this) power of unlimited and unchecked *ex parte* examination.'

Accordingly, even apart from the effect of the *Johnson* case, the Raffel doctrine is inapposite here: In Raffel, the defendant at his first trial had the same opportunity as at his second trial to confront and cross-examine the adverse witnesses, to be assisted by counsel, to object to incompetent evidence, to summon witnesses on his behalf, etc., etc. Nor should we forget that the constitutional privilege had its English origin in protests against questioning persons, *ex parte* and in secret, before they had been formally charged with any crime. It is noteworthy that the *Supreme Court has never applied the Raffel doctrine to a case where the previous exercise of the privilege occurred in a grand jury hearing.*" (Italics in original.)

It is thus apparent that since inconsistency does not complicate the situation herein, and all that appears is that Halperin properly invoked his privilege and was properly granted it, that no impediment exists to the plenary application of the *Johnson* doctrine to the facts herein, to wit that Halperin's claim of privilege is properly no part of the evidence to be submitted to the jury.

Moreover, it is noteworthy that this Court in the *Raffel* case merely adjudicated the question certified to it which was whether it was error to compel Raffel to disclose that he had failed to testify on the first trial. This Court did not hold that the Trial Court was entitled to charge the jury that his failure to testify on the first trial impeached his credibility or that the jury might so find. On the contrary, the opinion of this Court plainly indicates that only if inter-

rogation regarding the defendant's failure to testify at the first Trial produced evidence of discrediting motive might the jury deem his credibility impaired, on the score of his testimony in chief (p. 498 of 271 U. S.).

In our case, as we have noted, Halperin's claim of constitutional privilege was accompanied by a statement pointing to the very differences between a grand jury examination and a trial as the grounds for his refusal to testify and implicitly promising to testify at a trial. Thus even if the government could initially inquire into the subject, Halperin's answers were productive of no basis, under the *Raffel* doctrine, for the trial court to invite the jury to disbelieve Halperin's testimony in chief.

**(2).**

Judge Frank's opinion urged further that even if the *Raffel* doctrine applied to the instant case, it should (a) be rejected as erroneous and (b) that it has already at least, inferentially been overruled by this court.[8]

(a) Judge Frank cites in support of his argument that the *Raffel* decision is erroneous, the criticism of the case by Hinton which appeared in 21 Ill. L. Rev. (1926) 396-400. Hinton noted that since it is practically impossible where the witness in question is the defendant himself to limit the jury's use of the evidence of prior silence to credibility as distinguished from proof of guilt that the policy of the law should be to exclude it altogether.

See, quotation from the Hinton article, in Judge Frank's opinion (Vol. V, Appendix 319a, 320a).

[8] Judge Frank's opinion was written before this court's decision in the *Slochower* case. The Court of Appeals decision was announced on April 10, 1956. The *Slochower* case decision was handed down on April 9, 1956.

Judge Frank in his opinion adds (320a, 321a):

> "Hinton was surely correct in saying that a jury will not be able to heed the judge's cautionary charge that such evidence must be given effect solely in its bearing on the credibility of the accused. Like many other sorts of cautionary instructions, it asks the jury to do the well-nigh impossible. In Nash *v.* U. S., 54 F. 2d 1006 (C. A. 2), Judge Learned Hand wrote of 'the recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody's else'; in U. S. *v.* Gottfried, 165 F. 2d 360, 367 (C. A. 2), he said, 'nobody can indeed fail to doubt whether the caution is effective * * *'; see also his remarks in U. S. *v.* Paoli, F. 2d (C. A. 2), (January 10, 1956): In U. S. *v.* Antonelli Fire Works Co., 155 F. 2d 631, 656 (C. A. 2, dissenting opinion) it was noted that a cautionary instruction may emphasize the very matter the jury is told to forget, 'as in the story, by Mark Twain, of the boy told to stand in a corner and not think of a white elephant.' Mr. Justice Jackson, concurring in Krulewitch *v.* U. S., 336 U. S. 440, 453, observed: 'The naive assumption that prejudicial effects can be overcome by instructions to the jury * * *, all practicing lawyers know to be unmitigated fiction.' It 'is well enough,' said Wigmore (8 Wigmore, p. 416), 'to contrive artificial fictions for use by lawyers, but to attempt to enlist the layman in the process of nullifying his own reasoning powers is merely futile, and tends towards confusion and disrespect for the law's reasonableness.'"

McCormick on Evidence (1954) fortifies the position of Hinton and Judge Frank. The text states (p. 77):

> "The only available sanction for our rule is an instruction that the jury must not consider the prior statements of the witness as substantive evidence on the main issue, but solely as bearing on the

credibility of the witness. Such an instruction, as seems to be generally agreed, is a mere verbal ritual. The distinction is not one that most jurors would understand. If they could understand it, it seems doubtful that they would attempt to follow it. Trial judges seem to consider the instruction a futile gesture."

In footnote 16, page 77, the author states further:

> "All five of the Texas District Judges who answered my inquiry agreed on this, see note 13, *supra*. One of their comments follows: 'It is my opinion that an instruction to the jury advising that "the prior inconsistent statement can only be considered for impeachment purposes", is not understood by the average jury, and even a jury composed of lawyers would have difficulty in drawing such a fine distinction.' "

The case of Halperin, the accused, testifying in his own behalf constitutes a classic example of the futility of directing a jury to limit its use of the evidence that Halperin invoked the Fifth Amendment to the sphere of credibility —inevitably the substantive and the credibility phases of the case coalesced and merged in the minds of the jury.

Thus, since the claim of constitutional privilege is not evidence of guilt (*Ullman* v. *United States*, 350 U. S. 422, 426, 427; *Slochower* v. *Board of Education*, 350 U. S. 551, 557), if more than mere lip service is to be given to the constitution as the supreme law of the land, then it follows that the rule of the *Johnson* case must be adhered to and the matter of the claim of constitutional privilege be deemed no part of the evidence in the case.

(b) Judge Frank in his opinion notes that this court's decision in *Johnson* v. *United States*, 318 U. S. 189 *supra*,

overrules the *Raffel* case (Vol. V—Appendix 323a). It is difficult to see how the language of the *Johnson* case quoted *supra,* admonishing that "no inferences whatever can be legitimately drawn by them [the jury] from the legal assertion by the witness of his constitutional rights" can co-exist with the doctrine of the *Raffel* case.

Moreover, the primacy of the right to claim the constitutional privilege without subsequent penalization therefor has been strengthened by the recent sequence of decisions in this court, including *Quinn* v. *United States,* 349 U. S. 155, and *Emspak* v. *United States,* 349 U. S. 190, and culminating in *Ullman* v. *United States,* 350 U. S. 422, *supra,* and *Slochower* v. *Board of Education,* 350 U. S. 551 (See, Judge Frank's opinion, Vol. V—Appendix 327a, 329a).

Actually, however, as we have urged, the overruling of the *Raffel* case is not essential to a determination that it was error for the trial court herein to instruct the jury that Halperin's credibility might be deemed impeached by his claim of constitutional privilege.

### C. (Question Presented 6).

The Trial Court compounded the prejudicial effect of the instruction authorizing petitioner's conviction via the destruction of his credibility because of his invocation of the Fifth Amendment by refusing to charge as requested that "An innocent man may honestly claim that his answers may tend to incriminate him" (774, 712, 713, 714), especially in view of the Court's attitude toward Halperin's claim of constitutional privilege, as exemplified by his above-noted remarks in the course of trial.

The prevailing opinion in the Court of Appeals overlooked the vital difference between the requested charge, and that given (748); the requested charge would have

served to correct the jury's misconceptions that an innocent man can not claim to be incriminated by his answers, and thus have explained to the jury why Halperin's action before the Grand Jury was irrelevant to the issues. The charge as given merely arbitrarily directed the jury to disregard what they undoubtedly deemed an important relevant fact, namely that an innocent man did not invoke the privilege (*Ullman* v. *United States*, 350 U. S. 442, 446 *supra*, 40 Amer. Bar Ass'n Journal 404, 406, *supra*). It was a futile and meaningless arbitrary effort to stop the jury short of utilizing the fact of claim of privilege substantively, as proof of guilt while investing it nevertheless with far reaching derogatory importance (Vol. V, Appendix, 319, 321a; McCormick on Evidence, p. 77). On the other hand the charge as requested would have been an exposition in the nature of that of this court in the *Ullman* and *Slochower* cases, *supra*.

**D. (Question Presented 3).**

Still another aspect of the multiple error implicit in the Court's rulings arises from the fact that a defendant has a statutory right to testify, no less than a right not to testify. The Government in a criminal case has no right to prejudice the defendant's election of whether or not he should take the stand in his own behalf. In the interest of the full development of the facts at a criminal trial, a defendant's right to testify (18 U. S. C. 3481) should be safeguarded, no less than his right not to testify, and should not be prejudiced in advance. This indeed is a further basis of this court's decision in *Johnson* v. *United States*, 318 U. S. 189, *supra*, holding that the jury may not legally draw any inference from a claim of privilege and that the making of such claim is not evidence to be submitted to the jury.

This court wrote (at p. 197 of 318 U. S.):

> "An accused having the assurance of the court that his claim of privilege would be granted might well be entrapped if his assertion of the privilege could then be used against him."

* * * * * *

(at p. 199):

> "When it [the court] grants the claim of privilege but allows it to be used against the accused to his prejudice, we cannot disregard the matter. That procedure has such potentialities of oppressive use that we will not sanction its use in the federal courts over which we have supervisory powers."

(See, also, *United States* v. *Modern Reed and Rattan Co.*, 2 Cir., 159 F. 2d 656, 658, for another holding to the effect that the government has no right to prejudice the defendant's election of whether or not he should take the witness stand).

If the government is to be permitted to elicit upon cross examination of a defendant at a criminal trial that he claimed his constitutional privilege before a grand jury, and if juries are to be authorized in effect, to give vent to their prejudices against those who claim the privilege, by rejecting the defendant's trial testimony simply because he had thus invoked the Fifth Amendment, it follows that the defendant's statutory privilege to testify at his trial has been encumbered, impeached and impeded. Thus, there is achieved the sinister dual derogation of both constitution and federal statute. The exercise of the constitutional privilege before a grand jury is burdened by subsequent penalty and a price—namely discredit at a subsequent trial—wrongfully exacted for its exercise. At the same time the statutory right of a defendant to testify at his trial

is rendered worthless to persons who have invoked their constitutional privilege before the grand jury. Thus, there is improvised, without constitutional or statutory warrant, and indeed in defiance of both constitution and statute, the requirement that a defendant *must* testify before a grand jury or forfeit the value of his right to testify at his trial! Yet the forums of grand jury and trial are so different, and the position of a defendant before indictment and after indictment so contra-distinguishable, that the very fundamental concept of a fair trial is undermined by the unwarranted condition and restrictions imposed by a rule permitting elicitation from a defendant that he had invoked his constitutional privilege and the discrediting of the defendant in unrelieved consequence.

## II.

**Due process was denied Halperin in consequence of the fact that he was subpoenaed to testify before a Grand Jury in an investigation of which he was a primary target and de facto defendant, particularly when his assertion of innocence before the Grand Jury and claim of constitutional privilege was effectively used to obtain his conviction (Question Presented 7).**

The following quotation from the statement of Halperin's counsel made at the trial in support of a motion to dismiss the indictment, clearly shows that Halperin was in fact a primary target of the investigation of the grand jury which subpoenaed him and that he was a prospective defendant at the time he was called before the grand jury (696-698):

> "Mr. Singer: I ask your Honor for permission to make a motion in the absence of the jury.

In view of the Government's insistence upon examining Mr. Halperin concerning his testimony given before the grand jury, which was investigating the very facts upon which this indictment is based, and in view of the fact that the Government has offered at this trial proof that a hypothetical statement concerning all of the facts and circumstances testified to by the witness Davis at this trial was submitted to the United States Attorney conducting that grand jury investigation in Brooklyn; and in view of the other record facts which establish beyond doubt that the witness Marks, the witness Marjorie Segel, the witness Greenstein, the witness Tobias, the witness Berman, had all testified before the grand jury; and in view of the fact that each of these witnesses has said that his testimony, at least concerning the facts and incidents relating to the defendant Halperin, was the same as the testimony of each of these witnesses before the Court; and further in view of the fact that when counsel for the defendant Halperin in certain instances called upon the Court to examine certain of the grand jury testimony of these witnesses; and in view of the fact that the Court has held in the instances where such grand jury testimony was examined by the Court that the testimony was, to use I think the Court's word, consistent with the witness' testimony here, and therefore refused the defendants the right to inspect this testimony, it appears very clearly that the defendant Halperin was subpoenaed and compelled to appear before the grand jury not as a witness but as a prospective defendant. Under these circumstances, and directly in accord with the authorities which exist, it was improper, illegal and in violation of the defendant Halperin's rights to require him to answer, without having warned him of his rights; and, unless he consented to waive his rights and was willing to be called as a witness, under such circumstances no defendant or a prospec-

tive defendant may be under any circumstances compelled to testify before a grand jury.

Now, it further appears that the defendant Halperin, having been so subpoenaed and having refused to answer certain questions upon the ground of his constitutional privileges and rights under the Fifth Amendment, is now in the position of having those very rights offered before this jury as proof of some fact or circumstance in this case. The testimony Mr. Halperin gave before the grand jury cannot be used for any purposes.

It was impossible prior to trial to make any motion in this regard since we had no information that any of the evidence used before the Brooklyn Grand Jury had been used before the New York Grand Jury which returned this indictment. However, it now, as I have said, definitely appears beyond any contradiction that he, Halperin, was not a witness before the grand jury; he was being examined as a prospective defendant.

I might say that he and his indictment was the ultimate purpose of that investigation in Brooklyn, as is established here by the proof at this trial."

Thus, militating further to remove the Trial Court's rulings on the subject of the Fifth Amendment from conformity to the essential dictates of "appropriate judicial guidance" (*Bollenbach* v. *United States*, 326 U. S. 607, 615), is the fact that petitioner Halperin was the target of the Grand Jury investigation (696, 697, 698) not contested by Government). He was a "de facto accused" in the language of *United States* v. *Scully*, 2 Cir., 225 F. 2d 113. He should not have been called before the Grand Jury at all, since by doing so, the Government was seeking an unsanctioned examination before trial. In the *Scully* case, the Court wrote at page 116 of 225 F. 2d:

> "Indeed, one would suppose that, as a matter of ethics or fair play or policy, a prosecutor would in all cases refrain from calling as a witness before a Grand Jury any person who is *de jure* or *de facto* an accused. The absence of appeals to this court involving the problem under discussion would seem to indicate that some such rule or practice is observed in prosecutors' offices in this Circuit."

In *United States* v. *Blanton*, 77 F. Supp. 812, 816 the court wrote:

> "Complaint is made as to certain defendants that they were called before the grand jury and gave evidence upon which indictments were later returned against them. Such practice is not commended. It could be abused to a degree that would bar prosecution. Prosecuting officials should be careful to protect the constitutional rights of all citizens."

In *O'Connell* v. *United States*, 40 F. 2d 201, 207 (certiorari granted 281 U. S. 716, dismissed years later under Rule 35; 296 U. S. 667), the dissenting opinion states:

> "Calling a prospective defendant before a grand jury investigating a criminal proceeding has been severely condemned. Counselman *v.* Hitchcock, 142 U. S. 547, 12 S. Ct. 195, 35 L. Ed. 1110; Brown *v.* Walker, 161 U. S. 591, 16 S. Ct. 644, 40 L. Ed. 819; People *v.* Ferola, 215 N. Y. 285, 109 N. E. 500; People *v.* Gillette, 126 App. Div. 665, 111 N. Y. S. 133. To compel him to take an oath virtually compels him to be a witness against himself. People *v.* Ferola, *supra;* Brown *v.* Walker, *supra.*"

In the *United States* v. *Lawn*, 115 F. Supp. 674, 677 the Court stated:

> "However, upon the trial of the defendant in a criminal case, it would be a clear violation of a

defendant's right against self-incrimination under the Fifth Amendment of the Constitution to compel him to take the stand, testify and produce his records, relating to the matter with which he is charged. Unless he volunteers, it would invalidate the trial. United States *v.* Housing Foundation of America, Inc., 3 Cir., 1949, 176 F. 2d 665. Title 18 U. S. C. A. Sec. 3481 makes a defendant a competent witness *at his own request.* It is thus improper to call him as a witness without a request on his part. 8 Wigmore on Evidence, 3rd Edit., p. 393; 3 Wharton's Criminal Evidence, 11th Edit., p. 1960.

For similar reasons, an indictment is invalid if a defendant against whom a criminal information has been filed, is called by the prosecution as a witness before the grand jury to obtain evidence tending to sustain an indictment against him, which supersedes the earlier information. Mulloney *v.* United States, 1 Cir., 1935, 79 F. 2d 566; United States *v.* Miller, *supra;* United States *v.* Kimball, C. C., 117 F. 156. In neither situation is the defendant required to claim the privilege. The law grants him this protection. It is a right which he alone may waive."[9]

In *People* v. *DeFeo,* 308 N. Y. 595, 602, 603 (1955), the New York State Court of Appeals cites this Court's decision in *Counselman* v. *Hitchcock,* 142 U. S. 547, in support of the textual statement that

> "... if it could reasonably be said that the [grand jury] investigation was aimed at the witness himself, even though he claimed no privilege, his status as a prospective defendant was deemed sufficient to confer immunity automatically, ..."

[9] Lawn, Giglio and Livorsi were later tried together and convicted. The conviction was affirmed 232 F. 2nd 589, 2nd Circuit. Certiorari was granted October 15, 1956 (*Lawn* v. *U. S.,* No. 131; *Giglio and Livorsi* v. *U. S.,* No. 133—1956 Term. These cases both present a situation somewhat similar to our question 7. Inquiry discloses that argument in these matters may not be had this term of the court.

In *People* v. *Feroia,* 215 New York 285, 289, the Court stated:

> "The practice of calling the accused as a witness in the very proceeding in which the charge is being investigated cannot be too severely condemned. • • • In a proceeding before a committing magistrate, it is the right of the accused to make a statement not under oath, but said section requires that before he is called upon to determine whether to exercise that right he must be given certain information. That provision does not expressly apply to a case where the accused is called as a witness, for the very good reason that the statute does not contemplate such a violation of his constitutional rights. It is the calling of the accused as a witness, not merely the administering of the oath, which virtually compels him to be a witness against himself."

Furthermore, that the invocation of constitutional privilege at a preliminary proceeding, by a person who has been called as a witness in that proceeding—despite the fact that charges against that person were being investigated in the very proceeding—could not be used against such person at his subsequent trial was deemed fundamental law by the Court in the said case. The Court condemned the practice of not advising the prospective defendant-witness that his "refusal to testify could not be used against [him];" (p. 289 of 215 N. Y.).

Thus, it is respectfully urged, that if the fact that Halperin claimed his constitutional privilege before the grand jury which subpoenaed him constitutes evidence against him, then it follows that since the very act of subpoenaing Halperin, a *de facto* defendant, was a violation of his constitutional rights, that the evidence against him was illegally obtained, and under the well established rule in the Federal Courts is for that very reason inadmissable against him (*Weeks* v. *United States,* 232 U. S. 383, 393, 398).

However, whether an indictment may stand where the target of the grand jury's investigation was called before a grand jury and there gave testimony constituting evidence against himself, or whether a conviction based upon such self-incrimination is valid, or whether the self-incriminating evidence must be denied admission at the trial, are all questions which actually need not be adjudicated at this juncture.

Whether or not this court eventually decides that self-incriminating evidence elicited from a "*de facto*" defendant before a grand jury invalidates a subsequent indictment or that a conviction based thereon cannot stand it appears plain that the conviction should not be based upon an assertion of innocence accompanied by a claim of privilege made by a *de facto* defendant called before a grand jury.

It suffices that it appears generally acknowledged that "as a matter of ethics or fair play or policy, a prosecutor would in all cases refrain from calling as a witness before a grand jury any person who is *de jure* or *de facto* an accused" (*United States* v. *Scully*, 2 Cir., 225 F. 2d 113, 116, *supra*); for if added to the wrong inhering in the practice of authorizing a jury to discredit a defendant who invoked the Fifth Amendment before a Grand Jury, there be present the supervening element that the very act of calling him before the grand jury was a violation of "ethics or fair play or policy", then clearly a situation has arisen where this court in the course of its supervision of standards of procedure in federal courts—aside from constitutional doctrine—under the rationale of *McNabb* v. *United States*, 318 U. S. 332, should intervene and invalidate a conviction thus disfigured.

Halperin particularly had the right to invoke his privilege without subsequent penalty of discredit as a witness at his trial, in view of the super-added circumstance that

the government was seeking an unsanctioned examination before trial in questioning him.

(Compare, *United States* v. *Minker*, 350 U. S. 179, 196.)

* * * * * *

In conclusion, it need only be noted that the errors herein, (Arguments I and II) involving as they do, constitutional and statutory considerations, as well as appropriate judicial guidance to juries cannot be deemed merely technical.

*Bruno* v. *United States*, 308 U. S. 287;
*Bollenbach* v. *United States*, 326 U. S. 607, *supra;*
*Dissenting Opinion*, Vol. V, Appendix, p. 329a.

Moreover, as Judge Frank noted (footnote 4 *supra*) *"the jury could reasonably have acquitted"* Halperin, and hence the error herein could not be deemed harmless.

## III.

**The Court of Appeals opinion appears to affirm the conviction of Halperin on the corrupt influencing of witnesses counts upon evidence that he advised prospective witnesses who had ample justification to do so, to plead the Fifth Amendment. This is error (Question Presented 11).**

The indictment did not charge Halperin with any such anomalous alleged offense as attempted corrupt influencing by advice to plead the Fifth Amendment. Counts 5, 6 and 7, charge attempted corrupt influencing by advising the prospective witnesses to give "fictitious, fraudulent, false and manufactured testimony".

A.

The Court of Appeals' opinion, on the other hand, appears to affirm the conviction of Halperin on the corrupt influencing of witnesses counts upon evidence of advice to prospective witnesses to plead the fifth amendment when the witnesses could do so with ample justification. The Court wrote (Vol. V, Appendix p. 315a):

> "The evidence adduced in support of Counts 6 and 7 describes attempts by Halperin himself to influence both Berman and Tobias. The substance of what Halperin said to both is reflected in the testimony of Berman that Halperin told him 'he felt he was going to stand on his constitutional rights and not do any talking. He wanted me to take the same stand, that I should not talk and stand on my constitutional rights. He mentioned the fact, that he had done me a good turn and that was the least I could do for him.'"

Halperin's testimony was, that in March, 1952, he did not call Berman, but Berman called him (665), and Berman said that Davis was down to see him the day before (666). Berman told Halperin that Davis had told him he was trying to make a deal with the United States Attorney in the Eastern District for immunity for himself and his partner, and that he wanted Berman to back him up by stating that the $60,000 had been paid as a fee (666). This was the first that Halperin knew that $60,000 had been involved in the package (666). Berman asked Halperin what he thought he should do and Halperin said that Berman should consult a lawyer and that "If you ask me as a lawyer, I would tell you to avail yourself of your constitutional privilege" (666). Halperin did not say that Berman had anything to fear by not talking (667), or that he, Halperin, had done Berman a good turn (667). Halperin never aided

and abetted anyone to get Berman to lie or impede justice (668). He had no dealings directly or indirectly with Tobias on March 15, 1952 (668). Halperin denied any conversation prior to Davis speaking to Marks.

Under Count Five, dealing with the influencing of Marks, there is no evidence that Halperin, himself, had any conversation with Marks with regard to his appearance before the Grand Jury, and no contention by the Government to the contrary. It is sought to hold Halperin in consequence of a discussion had by Halperin with Davis, Schopick and Hoffman, but all that was discussed there was a canvass of the sentiment of these defendants with regard to whether Davis' clients would plead their Constitutional privilege.

At first they felt that the clients would not talk and would plead their Constitutional privilege (361). Later, they became doubtful about this (362), and it was decided that Davis should communicate with Marks.

Fairly read, there is nothing in Davis' testimony with regard to these conversations which would warrant imputing to Halperin any intent that Davis should do more than merely ascertain his clients' intentions and perhaps to urge them to give further consideration to the advisability of their pleading their Constitutional privilege. Indeed, Davis' testimony shows clearly that his mission was merely one of inquiry and that he realized that there must be nothing said by him which could be used against him if Marks, as he expected, would report his conversation to the Grand Jury (363).

In *United States* v. *Herron,* 28 F. 2d 122, 123, D. C. Calif., the court held that it is not the law to make criminal the act of advising a witness to plead the Fifth Amendment where he is justified in doing so irrespective of the motive of the person so advising. The Court wrote:

"In the case of *Ex parte Irvine* (C. C. 1896) 74 F. 954, Circuit Judge Taft, now Chief Justice of the United States Supreme Court, in his decision said as follows: 'It is argued by counsel for the respondent that there was evidence before the trial court to show that the privilege was pleaded in bad faith, merely to save the defendants, and not to protect the witnesses from a prosecution of themselves. * * * We do not understand any of the American authorities to go so far as to hold that where, from the evidence and the nature of the question, the court can definitely determine that the question, if answered in a particular way, will form a link in the chain of evidence to establish the commission of a crime by the witness, the court should inquire into the motive of the witness in pleading his privilege.'

The witness himself, therefore, is protected in his claim of privilege by being allowed the privilege, irrespective of his motive for claiming the same.

In this case the defendant Herron is charged with influencing, by advising, the witness Rasmussen to claim a lawful privilege, and I do not believe it is the law or the policy of the law to make criminal, no matter what the motive might have been, the advising a witness to do that which was lawful and *would in fact* have protected the witness from disclosing self-incriminating matter." (Emphasis in original.)

In *United States* v. *Courtney*, 2 Cir., 236 F. 2d 921, 923, the majority opinion states:

"The government, in support of the judges order, argues thus: Since defendant initially explained that he refused to answer because the answers would impair his business and harm other persons, his subsequent refusal, on Fifth Amendment grounds, was in bad faith and, on that account, should be disregarded. We do not agree. If he was clearly entitled

to assert the privilege, his motives for doing so are immaterial. See Taft J. in Ex Parte Irvine C. C. 74 F. 954, 964-965, * * *."

The dissenting opinion concurs on the proposition that the matter of motive cannot invalidate an otherwise proper claim of privilege, but merely contends that the question of motive may cast doubt on the incriminatory nature of the question (p. 925 of 236 P. 2d).

In our case, the incriminatory nature of the questions as regards Berman, Tobias and Marks is established beyond possibility of doubt by the voluminous record, whereas in the *Courtney* case, which involved contempt proceedings for refusal to answer questions before the grand jury no trial transcript made their incriminatory nature clear.

In *Rosner* v. *United States,* 2 Cir., 10 F. 2d 675, it was held that it could not constitute obstruction of the administration of justice to induce a person not to answer a letter from the United States District Attorney requesting him to plead to an information, where the person so counselled had no legal obligation to obey the request.

In our case, too, there was no attempt to induce prospective witnesses not to comply with process, that is not to obey any subpoena to which they might be amenable, or not to tell the truth. The suggestion and advice related only to a matter where the witnesses had freedom of choice,—to plead the Fifth Amendment, or not to plead it, and in this sphere, upon the rationale of the *Rosner* case, *supra,* the influencing of witness statute was not operative (Compare, *United States* v. *Sprengel,* 3 Cir., 103 F. 2d 876, 883).

**B.**

Moreover, the language of the statute, making it a crime to corruptly influence witnesses (18 U. S. C., 1503),

although it may not be unconstitutionally vague under other circumstances and other contexts is too vague to constitute a basis for conviction under it where advice to claim the Constitutional privilege is involved. (Compare, *United States* v. *Cardiff*, 344 U. S. 174, 176; *Winters* v. *New York*, 333 U. S. 507.) Under such circumstances, the statute should be given a reasonable construction which will preserve its Constitutional definiteness (*United States* v. *Harriss*, 347 U. S. 612, 617, 618.) Applying this principle to our case, the statute must be denied extension to the act of advising a witness to claim his Constitutional privilege.

## IV.

**The Court of Appeals erred in holding that the Statute of Limitations did not bar prosecution of Halperin on the conspiracy charge. (Questions Presented 8, 9).**

On this aspect of the case, not only did Judge Frank dissent on the application for rehearing and vote to grant all of the convicted defendants a new trial, but the prevailing opinion commented: "This is an interesting and important question, seemingly one of first impression" (Vol. V, appendix p. 299a).

Consideration of this contention is facilitated and focalized by a passage in the Trial Court's instructions to the jury supplemented by a concession made by the Government.

The Trial Court charged that the Statute of Limitations barred conviction of the defendants upon the First Count unless an overt act was committed within three years prior to the date of the indictment, that the indictment alleged that the conspiracy comprehended within it,

a conspiracy to conceal the true facts from investigation should investigation thereafter eventuate, and that to convict the jury must determine that the conspiracy did indeed comprehend a conspiracy to conceal and that an overt act to carry out such purpose occurred within the three year period (732).

This aspect of the Court's charge dovetailed with the Government's concession, made in the course of argument upon defendants' motions to dismiss at the end of the Government's case, that no overt acts other than concealment had occurred within the three year period prior to the date of the indictment (565).

The separate conspiracies in our case, having specific objectives, terminated when the objectives were accomplished. Thus, the Pattullo Modes criminal prosecution conspiracy allegedly involving Halperin, Grunewald and Bolich, terminated when word of no-prosecution was communicated to the Pattullo principals in January, 1949 (36, 37, 74, 226-230). The Gotham Beef conspiracy likewise terminated when the decision of no-prosecution was received by the Gotham principals in October, 1948 (147, 148, 153, 154, 165, 166, 185, 282, 325). These two account for the main-stream of the Government's proof, and in view of the direct evidence in the case, the date of termination of the conspiracy can be set with chronological accuracy.

The direct evidence in our case with its verbatim context of separate conspiracies precludes resort to inferences[10] to spell out a single conspiracy.

Conspiracies are deemed terminated when their objective is accomplished and this accomplishment of objective and end of conspiracy can be pinpointed, in our case, as to time and place. (*Krulewitch* v. *United States*, 336 U. S. 440,

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[10] *Guaranty Trust Co.* v. *Minneapolis & St. Louis R. R. Co.*, 8 Cir., 36 F. 2d 747, 757; *Consumers Power Co.* v. *Nash*, 6 Cir., 164 F. 2d 657, 659; 20 *Amer. Jur.* 163.

442, 443; *Lutwak* v. *United States*, 344 U. S. 604, 616, 617; *People* v. *McQuade*, 110 N. Y. 284, 308 (bribery conspiracy accomplished—not continued by co-defendant's alleged subornation of perjury at senate committee hearing); *United States* v. *Irvine*, 98 U. S. 450, cited in *Fiswick* v. *United States*, 329 U. S. 211, 216.)

In our case, it is clear, that the various conspiracies, or any conspiracy cognizable under the First Count of the indictment had terminated more than three years prior to the date of the indictment herein.

Any conspiracy with regard to dissuading the Pattullo Modes or Gotham Beef taxpayers from giving testimony before the Grand Jury or to dissuade them from speaking to Congressional Committee investigators, upon the record, had its genesis after the conclusion of the Pattullo Modes and the Gotham Beef conspiracies. (See Dissenting Opinion, on Petition for Rehearing, Vol. V, Appendix p. 389a.) There is no evidence that before the termination date of either of these conspiracies—of any single conspiracy embracing the Pattullo Modes or Gotham Beef cases—it was ever an object of the conspirators to dissuade the Pattullo Modes or Gotham Beef taxpayers from answering questions of the Congressional Committee investigators or from testifying before the Grand Jury. Indeed, there could not have been, for neither the Congressional Committee nor the Grand Jury were then in existence or even projected.

The Government's contention, that a subsidiary conspiracy to conceal survived the central criminal tax fraud objectives, is simply a re-statement of the Government's contentions, made and rejected in *Krulewitch* v. *United States*, 326 U. S. 440, 443, and *Lutwak* v. *United States*, 344 U. S. 604, 616.

The position of Halperin, and indeed that of the other convicted defendants, Grunewald and Bolich, has been that

the alleged conspiracy herein terminated in 1949 when the taxpayers received administrative assurance of no criminal prosecution.

Although Judge Frank, in his dissenting opinion upon the petition for rehearing does not entirely accept this contention and perceives in the evidence the possibility that the conspiracy herein encompassed the purpose of preventing prosecution of the taxpayers for tax evasion, subsequent to the no criminal prosecution administrative accomplishment, in 1949, Judge Frank nevertheless acknowledges that the jury "may well have found—and, for all we know did find—that the conspiracy ended in 1949, since the jury may have found that it was not a purpose of the conspiracy to prevent prosecution of the taxpayers for tax evasion after that date" (Vol. V, Appendix p. 388a).

Assuming that the jury did so find, Judge Frank proceeds to accept petitioner Halperin's contentions, in the following language (Vol. V, Appendix p. 389a):

> "Even so, such an overt agreement to conceal, made after 1949, could not reasonably serve to prove that the conspiracy, if it otherwise ended in 1949, had, before 1949, included an agreement—other than by implication from the mere existence of the conspiracy—to conceal the conspiracy after 1949. It could serve, at most, to prove a new conspiracy to conceal an older conspiracy. In that event (although such a new conspiracy would be evidence of the older conspiracy) the defendants could not, on such evidence, be convicted of the older conspiracy which ended in 1949, since the statute of limitations would have run against the older three years after 1949. See *U. S.* v. *Siebricht*, 59 F. 2d 976, 978 (C. A. 2) to the effect that an old conspiracy 'could not be revived by the breath of a new and different conspiracy * * *' The defendants were not indicted for such a new conspiracy, and the judge's charge

precluded a conviction based thereon. See, e. g., *U. S.* v. *Siebricht, supra.*

It follows that, if (1) the jury found—as it may have—that the conspiracy ended in 1949, it could not also reasonably have found (2) that the conspiracy included any understanding to conceal the conspiracy (in order to avoid detection and punishment for conspiracy) other than such an understanding implied in the mere fact of the conspiracy. The second of those findings would be bad, under *Krulewitch.* But the charge permitted the jury to render a verdict of guilty based on both such findings. I think the language in *Lutwak* cannot be stretched to sanction such a charge, and that therefore the charge was erroneous."

Judge Frank concludes that there could be no conviction on the basis on which the Court submitted the issue to the jury, because a conspiracy accomplished in 1949 could no longer be prosecuted.

A request that defendants must be acquitted if the conspiracy to obtain decisions not to prosecute had been finished in 1949 (Grunewald's Request No. 23, (771), was denied with exception (713); adoption by Halperin of Grunewald's Requests and Exceptions, Appendix (713)).

Questions presented Nos. 1, 2, 4, 5 in the Grunewald appeal (No. 183) and question presented No. 1 in the Bolich appeal (No. 186) correspond to our question presented No. 8 (Statute of Limitations); and question presented No. 2 on the aforesaid Bolich appeal corresponds to our question presented No. 9 (Multiplicity of Conspiracies) (984, 985, 987). Petitioner Halperin as already noted adopts the argument on the Grunewald appeal (No. 183) and the Bolich appeal (No. 186) on this subject of the statute of limitations, and multiplicity of conspiracies as it bears upon the statute of limitations point.

If this court holds that it was error to interrogate Halperin regarding his claim of constitutional privilege, or to charge the jury that they might discredit his testimony in consequence thereof, Halperin's conviction upon all counts, it is manifest, must fall.

Moreover, if this Court upholds Argument IV, *supra* that the Statute of Limitations barred prosecution of Halperin under the conspiracy count of the indictment (Count 1) then it follows that Halperin's conviction under Counts 5, 6 and 7,—the corrupt influencing counts—must likewise be reversed.

The vast bulk of the testimony related to the conspiracy count and if such testimony was erroneously received in that the Statute of Limitations barred prosecution or in that a prejudicial variance between a single conspiracy alleged and a multiplicity proved vitiated the prosecution, then it follows that Halperin's conviction under Counts 5, 6 and 7 was in all probability based upon a sheer bulk of inadmissible evidence and hence should be reversed (*Boyd* v. *United States,* 142 U. S. 450, 458).

## Conclusion.

**The conviction of appellant Halperin should be reversed.**

Respectfully submitted,

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